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No. 188

In the

Supreme Court of the United States

OCTOBER TERM, 1957

GLENN HUBBARD HURST and EMPLOYERS CASUALTY COMPANY,

Petitioners,

v.

GULF OIL CORPORATION,

Respondent.

PETITIONERS' BRIEF IN REPLY TO BRIEF OF RESPONDENT

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1.

PREVIOUS OPINIONS

The opinion of the Trial Court is officially reported at 251 Fed. 2d 836.

2.

JURISDICTION

The grounds of jurisdiction stated in the petition which under Section 2 will suffice and will not be here repeated.

3.

STATEMENT OF THE CASE

We here refer to the statement of the case made under Heading No. 4 of the Petition.

4.

SPECIFICATION OF ERRORS

(1)

The Court erred in deciding this case under the law of Texas when the accident occurred in New Mexico and the common law throughout America requires that the law of New Mexico be supplied and in the alternative, if New Mexico has not decided the question or questions involved, then it becomes the duty of the Appellate Court to apply the weight of authority existing through all jurisdictions.

(2)

The Court erred in holding that the trial court was correct in entering a summary judgment for the Appellee, Gulf Oil Corporation, in this cause.

(3)

The Court erred in holding that Gulf's duties, under their contract and as a matter of law, did not require them to inspect the premises where the contractor's work was being performed to see if same was reasonably safe.

(4)

The Court erred in *failing to hold* in this case, where an actual discovery of the danger of Hurst was made by the Gulf representative, Stach, that the doctrine of

discovered peril did apply or, at least in the alternative, that Stach should have, after knowledge of the dangerous position of Hurst, given Hurst warning of his danger.

(5)

The Court erred in holding that the doctrine of inherently dangerous work does not extend to the employees of the independent contractor.

(6)

The Fifth Circuit held in the opinion that error was committed in the manner in which the trial court submitted the case to the jury. Hence, these questions are not raised by virtue of any complaint of the Fifth Circuit holding, but simply in order that this Honorable Court might review the entire case. Therefore, these additional questions are raised to the effect that the Court erred as follows:

(a) Petitioners allege that the Honorable Trial Court erred in charging the jury as follows, to-wit:

> "You are instructed that the duties imposed upon the parties hereto are such duties and such duties only as was required by knowledge or information of the parties on January 28, 1953, before the happening of accident. Such knowledge or information as has been acquired by or since the happening of accident concerning practices and safe practies shall not be considered by you for any purpose in determining issues which you are to be called upon to determine in this case."

Petitioner would show that he, then and there, after the charge of the Court had been given and prior to the jury's consideration of the same, excepted to the charge on the ground that in this case it is highly prejudicial since it *might cause the jury to disregard the evidence of Mr. Hurst*, and upon the further

ground that any information that was *present* that *could* have been acquired by ordinary investigation, such as the reading of journals by manufacturers of oil rope, *would have been available both before* and *after* the accident, and that it omits a duty which the defendant Gulf stands charged by knowledge with.

(b) Petitioner would further respectfully show that the Trial Court committed error in charging the jury as follows, to-wit:

> "In this case, such duty as rested upon Gulf Oil Corporation was *not the duty to furnish the* employees of Southeastern Drilling Company with *a safe place in which to work, but,* instead, to warn them of any dangers of which Gulf Oil Corporation knew or in the exercise of ordinary care should have known at the time when the work first commenced and of which such persons on its premises did not know or in the exercise of ordinary care should have known."

Plaintiff excepted to said instruction upon the ground that it *destroyed the earlier portions of the charge that it is Gulf's duty to furnish this plaintiff with a safe place in which to work,* and limits the condition of the place of work at the time when the work first commenced when it appears without dispute that when it first commenced, there was no danger to anyone, and amounts, in effect, to an instructed verdict against the plaintiff, to our great prejudice, and contrary to the law.

(c) Petitioners would further show that the Honorable Trial Court erred in charging the jury as follows, to-wit:

> "If you find from a preponderance of the evidence that Gulf Oil Corporation did nothing with reference to the selection or direction of use of the wire line which broke, then your verdict will be for the defendant."

Petitioner would respectively show, in this connection, that Plaintiff excepted to said charge upon the ground that since it is shown by the undisputed evidence that defendant did nothing affirmatively and the Court in said instruction does not distinguish between affirmative acts or acts of omission, it being only acts of omission and a failure to act with which the Gulf is charged, and it amounts in effect to an instructed verdict against the plaintiff.

(d) Petitioners would further show that the Honorable Trial Court erred in charging the jury as follows, to-wit:

> "You are instructed that the contract as between Gulf Oil Corporation and Southeastern Drilling Company provides that the contractor shall swab the well at the request of Gulf and it, therefore, devolved upon the contractor to determine whether it should conduct the swabbing work as it did, or hire a company to perform the work for it."

Plaintiff would respectfully show, in this connection, that plaintiff excepted to said charge upon the grounds that it amounts to a judicial construction of the Court on the contract that is not controlling in this cause, and if controlling, would be a matter of fact determination by the jury rather than an instruction of law as to its legal effect.

(e) Petitioner would further show that the Honorable Trial Court erred in charging the jury immediately following the portion of the charge given in Paragraph 4 of plaintiff's Motion for New Trial, as follows, to-wit:

> "Therefore, if you find from a preponderance of the evidence that the accident on which this suit is based was *proximately caused from the manner in which the well was* swabbed and from *the fact that the contractor itself elected to conduct the swabbing work instead* of having it done

by a swabbing company, then your verdict will be for the defendant, Gulf Oil Corporation."

Plaintiff would respectfully show, in this connection, that plaintiff excepted to said charge because it appears without dispute, *under the* evidence in this case, that *the contractor did* make the election. *The complaint is here not* that the contractor made the election but *that Gulf failed to prevent him from making the election*, and by the Court giving such instruction, it certainly should be like the remaining defensive issues and require the jury to make a finding that such act on the part of the Gulf, if any, was the sole, proximate cause of the accident in question, because this issue is simply another defense issue, and while the other defensive issues had the issue of sole, proximate cause, this one does not, to the great prejudice of the plaintiff.

(f) Petitioner would further show that the Honorable Trial Court committed reversible error in refusing and failing to charge the jury with Plaintiff's Requested Instruction No. 4 as follows:

> "You are further instructed that if you find and believe from a preponderance of the evidence that the defendant, Gulf Oil Corporation, *failed to provide proper overall supervision of* the work in progress, and if you further find and believe from a preponderance of the evidence that such failure, if any, constitutes negligence, and if you further find and believe from a preponderance of the evidence that such failure was the proximate cause of plaintiff's damages and injuries, then you will find for the plaintiff, Glenn Hurst, and assess his damages at such sum as you may find him entitled to receive under the measure of damages hereinafter submitted to you by the Court."

Plaintiff duly and timely excepted to the Court's failure to give such instruction, and such exception was allowed by the Honorable Trial Court.

(g) Petitioner would further show that the Honorable Trial Court committed reversible error in failing and refusing to charge the jury with Plaintiff's Requested Instruction No. 5, to-wit:

> "You are further instructed that if you find and believe from a preponderance of the evidence that the defendant, Gulf Oil Corporation, was guilty of negligence in swabbing or permitting the well to be swabbed by means of the draw works on the drilling rig instead of using a swabbing unit, and crew, and if you further find and believe from a preponderance of the evidence that such negligence was a proximate cause of the plaintiff's damages and injuries, then you will find for the plaintiff and assess his damages according to the measure of damages hereinafter submitted."

Plaintiff duly and timely excepted to the Court's failure to give such instruction, and such exception was allowed by the Trial Court.

(h) Petitioner would further show that the Honorable Trial Court committed reversible error in failing and refusing to charge the jury with Plaintiff's Requested Instruction No. 7, to-wit:

> "You are instructed that if you find and believe from a preponderance of the evidence that the defendant, Gulf Oil Corporation, failed to exercise ordinary and reasonable care to prevent the place in which Glenn Hurst was working from becoming unsafe, and if you further find and believe from a preponderance of the evidence that the failure, if any, of the Gulf Oil Corporation to exercise ordinary and reasonable care to prevent the place in which Glenn Hurst was working from becoming unsafe constitutes negligence, and if you further find and believe from a preponderance of the evidence that such negligence was and is a proximate cause of the plaintiff's

damages and injuries, then you will find for the plaintiff, Glenn Hurst, and assess his damages at such sum as you may determine under the measure of damages that will be hereinafter submitted to you."

Plaintiff duly and timely excepted to the Court's failure to give such instruction, and such exception was allowed by the Trial Court.

(i) Petitioner would further show that the Honorable Trial Court committed reversible error in refusing and failing to charge the jury with Plaintiff's Requested Instruction No. 10, to-wit:

"You are further instructed that if you find and believe from a preponderance of the evidence that Glenn Stach, employee of Gulf Oil Corporation, failed to keep a proper lookout for the safety of the said Glenn Hurst, and if you further find and believe from a preponderance of the evidence that the failure, if any, of the said Glenn Stach to keep a proper lookout for the safety of the said Glenn Hurst constitutes negligence, and if you further find and believe from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries sustained by Glenn Hurst, then you will find for the plaintiff and assess his damages at such sum as you may find him entitled to receive under the measure of damages hereinafter submitted.".

(j) Petitioner would further show that the Honorable Trial Court committed reversible error in refusing and failing to charge the jury with Plaintiff's Requested Instruction No. 11, to-wit:

"You are further instructed that if you find and believe from a preponderance of the evidence that prior to the time that the swabbing line broke that Glenn Hurst was in a position of peril, and if you further find and believe from a pre-

ponderance of the evidence that Glenn Stach discovered the said Glenn Hurst's position of peril at a time when he could have, commensurate with his own safety and the safety of others by use of means at his command, avoided injury to Glenn Hurst, and if you further find and believe from a preponderance of the evidence that the said Glenn Stach, realizing that Glenn Hurst probably would not or could not extricate himself from his position of peril, if any, and if you further find and believe from a preponderance of the evidence that under all of the above circumstances, if any, existing at said time that the said Glenn Stach failed to use the means, if any, at his command, to avoid injury to Glenn Hurst, and if you further find and believe from a preponderance of the evidence that the failure of the said Glenn Stach to use the means, if any, at his command to avoid injury to Glenn Hurst constitutes negligence, as that term has been defined, and if you further find and believe from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries suffered by the said Glenn Hurst, then you will find for the said Glenn Hurst and assess his damages at such sum as you may find him entitled to receive under the measure of damages to be submitted to you herein in this charge by the Court, and if you make such findings as hereinabove detailed with reference to negligence, if any, on the part of the said Glenn Stach after the discovery of the danger, if any, of the said Glenn Hurst, then you will find for the plaintiff, Glenn Hurst, even though you might believe or find from a preponderance of the evidence that Glenn Hurst failed to exercise ordinary and reasonable care for his own safety upon the occasion in question, or even though you might find and believe from a preponderance of the evidence that Glenn Hurst was guilty of contributory negligence, as

that term has been defined in this charge, and even though you might find and believe that such contributory negligence, was a proximate cause of the plaintiff's damages and injuries. In other words, stated more plainly, contributory negligence, if any, upon the part of Glenn Hurst is not a defense and does not excuse the Gulf Oil Corporation from their negligence, if any, provided you find and believe that the applicable provisions of the law of discovered peril as charged in this paragraph exist."

Plaintiff duly and timely excepted to the Court's failure to give such instruction, and such exception was allowed by the Trial Court.

5.

This case is controlled by Federal law and the Circuit Court erred in attempting to apply the law of Texas.

The brief of the respondent in this case fails to discuss the Federal case cited by Petitioners that is clearly in point with the fact situation here involved, to-wit, the decision of Judge Hand in *Halecki v. United New York and New Jersey, S. H. P. Ass'n, 251 Fed. 2d 708.* This case is discussed on Pg. 24 of the Petition for Writ of Certiorari. In this case, Judge Hand held, in effect, that the duty was upon Gulf, as applied to this case, even though the work was let out to a subcontractor, to exercise "reasonable care to ascertain the method and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities." This case standing alone is a complete reply to the

numerous contentions urged by the Respondent. This is particularly true since this case must be decided, not under Texas law, as was done by the Fifth Circuit in this case, but must be decided under the Federal law in order that the rights of the Petitioners under the Seventh Amendment to the Constitution of the United States can be preserved.

Recent decisions in support of the Petitioners' contention as set out in our Petition for Writ of Certiorari on this point are *Allen v. Matson Navigation Company, 255 Fed. 2d 273.* In this case, the Court said on Pg. 281:

> "We also note that while that circumstance would not in our opinion alter the result here, yet 'the sufficiency of certain evidence to raise a question of fact for the jury * * *' should not be controlled by state law." *5 Moore's Federal Practice, 2nd ed., Sec. 38.*

In Footnote 11, Pg. 282, the Court cited the following additional cases with this comment:

> "11. Pogue v. Great Atlantic & Pacific Tea Co., 5 Cir., 242 Fed. 2d 575, 582: 'The kind of jury trial to which the parties are entitled in Federal Courts under Rules 38 and 39 of the Federal Rules of Civil Procedure, 28 U. S. C. A., is that preserved by the Seventh Amendment to the Constitution, to which the doctrine of Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, is of course subservient. Wright v. Paramount-Richards Theatres, 5 Cir., 198 Fed. 2d 303, 305; Reuter v. Eastern Air Lines, 5 Cir., 226 Fed. 2d 443, 445; Reynolds v. Pegler, 2 Cir., 223 Fed. 2d 429, 433, 434.'
>
> "These cases may explain the extent to which the Supreme Court has indicated it is prepared to go in sustaining the sufficiency of the evidence to support a jury verdict in cases where the inferior federal courts

have set verdicts aside. See for example the following, none of which are F. E. L. A. cases: Williams v. Carolina Life Insurance Co., 5 Cir., 210 Fed. 2d 477, reversed at 348 U. S. 802, 75 S. Court 30, 99 L. Ed. 633; Atlantic Coast Line Railroad Co. v. Swafford, 5 Cir., 220 Fed. 2d 901, reversed at 350 U. S. 807, 76 S. Ct. 80, 100 L. Ed. 725; Eastern Air Lines, Inc. v. Union Trust Co, 95 U. S. App. D. C. 189, 221 Fed. 2d 62, reversed at 350 U. S. 907, 76 S. Ct. 192, 100 L. Ed. 796; Phillips Petroleum Co. v. Gibson, 5 Cir., 232 Fed. 2d 13, reversed at 352 U. S. 874, 77 S. Ct. 16, 1 L. Ed. 2d 77."

It is therefore quite apparent that the Fifth Circuit erred in deciding this case under what they claimed to be the law of Texas and that the Petition for Writ of Certiorari should be granted and the law as determined in the *Halecki* case by the great, distinguished Judge Hand should be applied.

In this connection, however, we would like to point out that the Fifth Circuit has misconstrued Texas decisions relating to the controlling points here involved.

In the case at bar we have the undisputed admission of Stach, foreman for Gulf, that he recognized that swabbing the well by means of the draw works was a dangerous method of doing the work, and further that he knew that due to the position that Hurst had to assume in getting up there in an attempt to guide the line, or spool the line, that he was in a dangerous position and would be likely to be hit in the event the line broke. Further, the jury could have concluded from all of the evidence introduced, that Stach knew or certainly should have known that placing *kinks* in a line made it more likely to break.

In *Bergquist v. Penterman, 134 Atl. 2d, pg. 20,* the Superior Court of New Jersey held:

"Plaintiff, as administratrix of the estate, brought an action in the Superior Court against George Penterman, a plumbing contractor, his employee, Kivimage, and Point Pleasant Home Construction Company (hereinafter Point Pleasant) for damages for personal injuries to and the death of Bergquist because of their negligence. Decedent was fatally burned as a result of an explosion which occurred on October 13, 1955, while he was doing floor finishing work in a dwelling then under construction at defendant Point Pleasant's development. The matter was heard before a Judge and jury.

"At the time of the accident defendant Point Pleasant was engaged in the construction of a development known as Oak Park, located on a large tract it owned in Point Pleasant, New Jersey. It had completed and sold all the 26 homes comprising the first section of the development, and four in the second. Eight or nine houses were in various stages of completion. The company engaged no general contractor, but furnished the material for the jobs and through its Secretary-Treasurer, Potter, arranged for the services of individual contractors at a fixed sum per house. These contractors furnished their own workmen, supplied incidental materials, supplies, tools and equipment needed on the jobs, and generally exercised complete supervision over their respective employees and the manner in which the work was done.

"Point Pleasant conducted its operations from a Field Office six blocks from the development. Potter was in charge, with a Mrs. Wood acting in his absence. Schedules containing the job numbers of houses under construction and their tenative completion or delivery dates were posted on a bulletin board for the information of contractors who came to the office. Construction would start as soon as a company had

purchase contracts for one or more dwellings. The schedule was a flexible one, the work of each contractor being governed by the progress of the work ahead of him. Generally, contractors worked at their own convenience, since they had jobs other than Point Pleasant. In order to keep in touch with construction activities, they would ordinarily stop in at the office, note the progress of other contractors, and begin work when they saw a house was ready for the job they had to do.

"Potter testified that he coordinated the activities of all contractors so as to get a house completed at a certain time, if possible. As a completion date approached, he would get in touch with contractors and pressure them to complete their jobs. He saw to it that the contractors 'did their own work in a workmanlike manner.' Once in a while he would go through the houses to see that the work was up to specifications. He claimed to be familiar with the work each contractor had to do, 'as a layman.' He admitted knowing that a torch had to be used in annealing the copper tubing that went into a heating system such as was installed in the Point Pleasant houses. He also knew that a sealer or lacquer was used in finishing floors, but said he had not inquired as to whether the material was flammable.

"According to Potter, house No. 5 where the accident occurred, was handled no differently than any other dwelling in the Oak Park development. It had been sold to one Colger and his wife, with occupancy promised for October 15, 1955. Colger was very anxious to move in; as the date came closer he repeatedly requested Potter and those working on the jobs to do 'whatever they could to get me in my house.' The explosion occurred about 2:00 P.M. while decedent was lacquering the front corner bedroom. At that moment Kivimage was working in the cellar underneath the rear center bedroom and was standing on a four foot stepladder fixing a joint. He had lit an acetylene torch

with a ½" flame and placed it on the top of the ladder about four feet from the cellar ceiling. He testified he had not yet applied any flame to the pipe joint when suddenly there was an explosion. Kivimage further stated that he knew generally the kind of work decedent did sanding and applying sealer and lacquer, but did not know 'exactly what they do, what way they worked, what they use I wouldn't know that, I have no idea.' In answer to a specific question, he said he did not know that the sealer or lacquer was being applied to the floor upstairs while he was working in the cellar.

"Plaintiff makes the dual argument that (a) defendant Point Pleasant, as land owner in control and possession of the premises, is liable for workmen for injuries resulting from a hazardous condition upon the premises and (b) it was negligence in so coordinating the work that a plumber should be working with a torch in proximity with a floor finisher working with flammable lacquer. The general rule is that an owner or occupier of a premises who by invitation, expressed or implied, induces a person to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for the purposes embraced in the invitation.

"Point Pleasant seeks to escape liability under that rule by arguing the applicability of the exception and drafting upon it by the Court in Broecker v. Armstrong Cork Company, 24 A. 2d 194, that an owner is not liable where independent contractors or his employees come upon land by invitation to correct the precise condition which causes the injury. See Gibilterra v. Rosemore Homes, Inc., 115 A. 2d 553. We do not consider the exception applicable in the instant case. Bergquist's injury and eventual death did not stem from a dangerous condition he was called on to correct, or one which is necessarily inherent in the work he was doing. Fire was not the particular hazard involved in the floor finishing job; the danger was the

conjunction of the lacquering with the plumbing work (and its open flame torch) with which the owner had something to do.

"It should be noted that the status of Point Pleasant as owner and possessor of the premises in question is purely incidental. The controlling consideration is negligence. Negligence in respect to the conduct of those who were participants directly and indirectly at the time and place of the fatal explosion. *Bergquist's injury and death were attributable to what was being done in the course of completing the plumbing and floor finishing contract work, and not to a physical condition existing on the premises before the employee came upon the scene as in the cases defendant cites.*

"Plaintiff insists that although the defendant Point Pleasant entrusted the work at the Oak Park development to the independent contractors, it nevertheless retained control of the work through its representatives Potter and Mrs. Wood; that by its 'active participation in ordering the various craftsmen to complete the work in house No. 5 on October 13, 1955,' it 'created an unsafe condition on the premises and failed to adequately safeguard the workmen whom it had invited upon the premises.'

"Generally, one whom employs an independent contractor is not liable for injury occasioned by the latter's negligence or that of his employee. 2 Restatement of Torts, Sec. 409, p. 1100 (1934).

"A number of exceptions and apparent exceptions to this immunity have arisen. An employer will be held for his own wrong, Restatement, above, Sec. 410, p. 1102; he may have been negligent in hiring unskillful and improper persons as contractors, Ibid, Sec. 411, p. 1107; Healy v. Sayer, 147 A. 534. Giving the contractor poor instructions of faulty equipment, Restatement of Agency, Sec. 213, p. 464 (1933); Torts, Sec. 415, p. 1122; or *FAILING IN HIS DUTY TO*

INSPECT THE WORK WHICH THE CONTRACTOR WAS EMPLOYED TO DO. 2 Restatement of Torts, Sec. 412, p. 1114. See generally 2 Harper and James, Law of Torts, Sec. 26.1, 26.2, Pgs. 1362 to 1405 (1956).

"The employer of an independent contractor will also be held liable if the work was of a kind which the employer should have recognized would in its progress necessarily create the danger of the mishap which occurred, and thus contained or involved an unreasonable or peculiar risk of bodily harm to plaintiff unless special precautions were taken. 2 Restatement of Torts, Sec. 413, 416, Pgs. 1118 to 1128 (1934); citing Sarno v. Gulf Refining Company, 124 A. 145, Affirmed Per Curiam; 130 A. 919, Terranella v. Union Building and Construction Co., 7 A. 2d 753 (1950); Gibilterra v. Rosemore Homes, Inc., above, 115 A. 2d at page 555. It is not necessary for us to deal with the interesting subject of vicarious liability where A is held liable to C for damages which B's negligence has caused C, even though A has been free from negligence or other fault—and this because of some relationship between A and B. For the basis in history, reasoning and policy for the imposition of such liability, see Harper and James, Op. Cit., Sec. 26.1 to 26.5, p. 1361, et seq. (1956) and Sec. 2611, p. 1395, et seq., for application in the case of independent contractors. As is there pointed out, the most common test of a relationship to which the law attaches vicarious liability is control or the general right of control. In such a case, the employer is responsible for the negligence of the independent contractor even though the particular control exercised and its manner of exercise had no causal relationship with the hazard that leads to the injury, *just as in the case of a simple employer-employee situation.* Ibid, Sec. 26.3, p. 1366, Sec. 26.11, p. 1401, et seq., and Sec. 26.7, p. 1374, et seq. Stephens 'Test of the Employment Relations,' 38 Mich. Law Rev., 188 (1939). Liability often

flows not from the concep' of the employer fault, but from the law's policy as to the liability for risk broadly incidental to the enterprise of the employer, whether of an independent contractor in the exceptional situation or of an ordinary employee in the standard situation. Harper and James, Sec. 26.5, p. 1370, et seq. The question is, is the risk fairly allocable to the enterprise. Ibid, Sec. 26.11, p. 1400.

"What we have here, on the other hand, is a case of liability for direct negligence on the part of the employer of the independent contractor—in short, liability for fault by Point Pleasant—whether or not there may also be vicarious liability for the fault of the independent contractor. A specific formulation of the rule applicable in this situation is to be found in 2 Restatement of Torts, Sec. 414, p. 1120 (1934). 'One who entrusts work to an independent contractor but who *retains the control of any part of the work* is subject to liability for bodily harm to others for whose safety the employer owes a duty to exercise reasonable care which is *caused by his failure to exercise control with reasonable care*'."

The Opinion places in italics the above portion of the above paragraph; and we wish to do the same.

"'Under comment A it is noted that the employer may, however, retain control *less* than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done. Such a supervisory control may not subject him to liability under the principles of agency, *but he may be liable under the rules stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work he had ordered to be done from causing injury to others.*' Here the jury could have found that Point Pleasant did control a part of the work, viz., the time when the floor finishing would be done, and

its coordination with the plumbing work. There was evidence from which it could have reasonably concluded that both the finishing of the floor with flammable lacquer and the use of the open torch flame near the ceiling of the cellar, close by the openings in the floor through which the heating pipes were directed by Point Pleasant to be done on October 13th. Here we recall what Penterman said about being directed to finish his work on October the 13th, as well as the testimony that Deaton had been directed to return to his floor finishing job on that date after he had left the house.

"A jury question arose as to whether the control by Point Pleasant was exercised with reasonable care, in view of the expert testimony that floor lacquer and open flame were not safely to be used near each other. There was also the testimony that Point Pleasant, through Potter, *knew, or should have known, that an open flame would be used by the plumber in annealing the the pipe joints, and that it knew, or should have known, that flammable lacquer would be used in view of Deaton's testimony that he had used such lacquer in 75% of the houses in which he had done floor finishing for the company.*

"The principle of liability discussed under Section 414 of the Restatement of Torts is treated in another way in Harper and James, Op. Cit., Sec. 2611, p. 1405, where it is said that, 'The employer will of course be held for his own wrongs.' The authors give this example. '*The employer's negligence may also be found in a failure to exercise supervision over or to perform some part of the operation which he has not in fact delegated to anybody else under the contract, or which he has in fact assumed to exercise or perform.*' In the present case, the work of coordinating the work of the several contractors, from the standpoint of the SECURITY OF THEIR RESPECTIVE EMPLOYEES FROM RISK OF INJURY WHICH MIGHT ARISE BECAUSE OF THE WORK OTHERS

WERE DOING, WAS EITHER NOT DELEGATED TO ANYONE (THUS CONSTITUTING A CULPABLE FAILURE TO SEE TO IT THAT SUCH SUPERVISION WAS EXERCISED BY SOMEONE), OR WAS ASSUMED BY POINT PLEASANT ITSELF AND DONE NEGLIGENTLY (OR SO THE JURY COULD HAVE FOUND) IN RESPECT TO THE HAZARD ARISING FROM THE SIMULTANEOUS OPERATIONS INVOLVED, MAINLY THE LACQUERING OF THE FLOORS AND ANNEALING OF THE PIPES."

As said in the *Patterman* case, the work here of coordinating the work of several contractors from the standpoint of the security of their respective employees from risk of injury which might arise because of the work others were doing, was either not delegated to anyone or was assumed by Gulf itself and done negligently in respect to the hazard arising from Gulf's *permitting* in this case the work to be done in a *negligent* and *dangerous* manner after they *had knowledge that same was being done*, and when there was plenty of time either to have controlled the method of doing the work or to have given Hurst warning of his danger and this is particularly true in this case where Gulf reserved the right to determine whether the work was being performed with maximum safety precautions and had Stach moved out to the well site and live there so that he could discharge this duty owed by Gulf.

The law on this point as to the *Hurst* case in particular was well established in *Wright v. Tudor City 12th Unit, Inc., et al., 12 E. 2d 307*. The Court says as follows:

"The defendants argue that it was not necessary to do this work on the street, that it should have been

done in the basement, and that, therefore, the negligence was collateral and a mere detail of the work. But this work had been going on for six months, and there was testimony that it was done on the sidewalk on all warm days and in the basement only when it was cold. What is meant by cold becomes plain when we find that work being done on the sidewalk on the 6th of December. From this the jury could have concluded that the work was being done on the sidewalk the greater part of the time, and that defendant must have or reasonably should have known of the place where it was being carried on. Thus there was evidence to sustain a finding by the jury that the defendants were aware that the work, which they had delegated to another, was being done in a way from which danger to the public was reasonably foreseeable. The charge on this question was fair. We cannot say, as a matter of law, that cleaning of mats with soap and water on the sidewalk of Forty-Second Street in New York City does not, by the nature of the work, involve danger to pedestrians. We reach the same conclusion whether we regard the work as constituting a nuisance or only negligence."

It will thus be seen that the protection of the rule announced in the *Tudor* case is extended to charge the defendant here with negligence not only with those things of which he was *actually aware*, but of the things of which *he could have become aware*.

6.

The rule of inherently dangerous work protects the employee of the independent contractor who occupies the status of invitee.

The Fifth Circuit has again refused to follow the Federal law in connection with the rule of inherently dangerous work. The Federal law recognizes that the doctrine of

inherently dangerous work does inure to the protection of the employee of the independent contractor. No better statement of the Federal law on this matter can be found than the opinion in *American Pacific Whaling Co. v. Kristensen, 93 Fed. 2d 17*, in which the Court said:

> "It eliminated entirely the exception to the rule, i. e., that the employer is not relieved from imputation of negligence in cases presenting the principle of 'dangerous instrumentalities.' If the work done by an independent contractor has in it an inherent element of danger, and, through negligence of the contractor, proper provision has not been taken to guard against such danger, such negligence is imputed the employer. If the work 'from its nature, is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability for the discharge of that duty by employing the contractor, if the latter does not take these precautions.' Penny v. Wimbledon Urban District (1899), Q. B. 72, 47 Week. Rep. 565. See, also, St. Paul Water Co. v. Ware (1872), 16 Wall. 566, 21 L. Ed. 485; Jacob Doll & Sons, Inc. v. Ribetti (C. C. A. 3, 1913), 203 F. 593; Ohio Southern R. Co. v. Morey (1890), 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701; Richman Bros. Co. v. Miller (1936), 131 Ohio St. 424, 3 N. E. 2d et al. (1894), 80 Md. 348, 30 A. 643, 45 Am. St. Rep. 345."

This Honorable 5th Circuit Court in reaching its conclusion that the doctrine of inherently dangerous work should not apply to the servants of an independent contractor relies upon a citation from 57 C. J. S., Master and Servant, Sec. 600, Pg. 372. There are only two cases cited by the text in support of this doctrine, to-wit, the case of *Louisville and N. R. Co. v. Smith's Adm'r., 119 S. W. 241*, and

Omaha Bridge and Terminal Rwy. Co. v. Hargadine, 96 N. W. 1071. These cases do not represent the controlling view in America on this all-important subject. In *Texas Electric Service Co. v. Holt, 249 S. W. 2d 664*, which is a far more recent decision than the *Bell* case relied upon by the 5th Circuit, the Court on Pg. 667 of the Opinion said as follows:

> "Under the testimony in this case, we do not feel disposed to *apply the exception, supra*, to the effect that the employer is liable for injuries sustained by an employee of an independent contractor while performing work for said employer. *This doctrine may apply to the contractor's employees when the work to be done by the independent contractor is so inherently dangerous in nature* that it prevents the employer from escaping liability by farming out the work to an independent contractor. See 23 Tex. Jur., Pg. 568, Sec. 22; 23 A. L. R., Pg. 1085. Further, the employer owes a non-delegable duty to provide a safe place to work, that is if he is furnishing same, and in some instances, while doing so, may become liable for injuries received by the independent contractor's employees. 23 Tex. Jur., Pg. 564, Sec. 18."

Again the Fort Worth Court said:

> "We note in 23 Tex. Jur., Pg. 564, Sec. 17, under title of Independent Contractors, the following:
>
> "'As to the contractor's servants who may suffer injury, the employer or owner is not ordinarily liable unless the work was inherently dangerous, etc.'"

It is *true* that on Pg. 568 the Texas Court of Civil Appeals distinguishes the *Bell* decision with the following language:

> "It must also be borne in mind that in some instances *an exception* to the rule before us is not to be

> *confused, co-mingled with,* or *considered the same as the rule regarding liability of an employer to an invitee who is a third person* for negligence of the independent contractor in the performance of such work. See 23 Tex. Jur., Pg. 574, Sec. 25."

The section referred to by the Fort Worth Court as above reads on Page 574, Sec. 25, Tex. Jur., as follows:

> "Failure to exercise due care in the selection of a competent contractor may, it has been suggested, render the employer liable for injury in certain situations. But the rule would have no application as to the owner or employer and servants of the contractor."

Clearly there might be some justification for saying that one who has selected as his own employer one that is reckless and incompetent cannot sue another for negligence in doing what he himself *has knowingly done.* However, that rule has no application to the question of the duty that is owed when inherently dangerous work is being performed by servants of the independent contractor. As said in the recent case of *International Harvester Co. v. Sartain, 222 S. W. 2d 854,* after discussing the question in inherently dangerous work, the Court held:

> *"It does not seem important to decide whether Sartain was strictly an invitee because he was properly on the premises and a duty was owed to him not to expose him to, etc."*

Our Texas Courts have repeatedly held, as well as the Courts of all other jurisdictions, that when the owner of premises, such as Gulf in this case, invites one upon their premises to perform work, the duty is not only to *furnish* a safe place in which to work, but to *keep* the place safe.

It seems incredible that we can agree on this as the rule and then hold that a duty under such circumstances is not legally cast upon Gulf that can be delegated to an independent contractor for its performance. Hence, under the doctrine announced in the *Henger* case, *226 S. W. 2d 425, it is not necessary that Gulf be anything other than the owner or invitor of the employee, and that the employee be an invitee. This applies whether the work is inherently dangerous or not.*

Quoting from *23 A. L. R. 1133*, cited in the *Holt* case, supra, the learned author of that volume says as follows:

> "The broad theory has also been propounded that the doctrine which imposes upon the principal employer an enlarged liability in respect to inherently dangerous work, does not enure to the servant of the contractor. The reasoning by which this theory was supported is far from satisfactory. It seems to be conclusively indicated by the consideration that, so far as the principal employer is concerned, the servant of a contractor is a member of the public, and as such entitled to enforce his remedial rights on the same footing as other persons belonging to that category."

An analysis of all of the cases since decided and citations given in the Supplemental Blue Book of A. L. R., would show that in all of them, save the *Bell* decision and the early *Salmon* decision, originally *Salmon v. Kansas City* decision, originally relied upon, *241 Mo. 14* that the rule has now been extended to the employee of the independent contractor, not upon the grounds that he is a *third* person, since technically he is *not a third person*, but upon the grounds that *he is an invitee.*

No other logical reasoning, we respectfully submit, could be indulged, save and except to afford this protection to the employee of the independent contractor, and this has been done in Texas under the decisions heretofore quoted and cited in *Lloyd v. Harrington, 182 S. W. 2d 1003*, by the Supreme Court of Texas.

In the case of *Evans v. Elliott, 17 S. E. 2d 125*, the Court pointed out, speaking of inherently dangerous work:

> "To come under the second condition of liability it is only necessary that the work which, as a general rule, may be carried out with safety if certain precautions are observed, will likely cause injury if the precautions are omitted."

Again the Court says:

> "To get the whole picture, we must understand the conditions under which the work is to be done within the contemplation of the parties, the known circumstances which attended it, enter implicitly into the question, whether it is hazardous—*that is, whether it involves an appreciable and foreseeable danger to the workers employed there or to the public generally against which suitable precautions must be taken.* Citing Young v. Fosburg Lumber Co., 147 N. C. 26; 60 S. C. 654; Hunter v. Southern Rwy., supra; Coe v. Kern, 176 N. C. 289; 97 S. E. 33; 11 A. L. R. 560, and it must be observed, too, that the liability of the employer is not affected by the fact that these precautions are usually taken or that the independent contractor explicitly agrees to provide them.
>
> "Known conditions under which the contract must be carried out, the time, place, and circumstances attending the work, may unquestionably effect its character as hazardous or non-hazardous."

The case of *Continental Paper Bag Co. v. Bosworth, 215 S. W. 126, affirmed 269 S. W. 83 (Tex. Comm. App.)*, holds:

> "Ordinarily the owner of premises is not liable for the injuries to an independent contractor's servants in the course of the work that has been engaged. But impractical methods cannot reasonably be assumed to be within the contemplation of the parties, and, where, as shown by some of the evidence in this case, it is proved that the work under circumstances caused by the owner in the first instance, is, as a practical and ordinary matter, unusually dangerous of itself, unless proper precautions are taken, the owner is liable for proximately resulting injuries."

In this case, the conclusion is irresistible that the evidence shows that swabbing is usually dangerous unless it is done by a *swabbing crew, specially trained* with *special equipment* for that purpose and that Gulf was guilty of negligence *in permitting* by the terms of the contract the independent contractor to have the option to select a dangerous method of doing this work, to-wit, swabbing from the draw works. This is particularly true where they had knowledge of the fact that same was being dangerously done in time to have warned the inexperienced plaintiff, Hurst.

The Supreme Court of Massachusetts in *Carpenter v. Sinclair Refining Co., 129 N. E. 383*, takes care of this situation in the following language:

> "At the time of the accident, the plaintiff was the employee of an independent contractor. He was on the defendant's premises by the defendant's invitation,

> and under these circumstances *he owed him the same duty he would owe to one of his own employees.* That duty was to warn him of dangers incident to his work, which he did not know of or apprehend and could not reasonably have discovered, and which dangers the defendant knew, or should have known. The defendant could not delegate this duty to warn the plaintiff regarding obscure and concealed dangers."

There can be no doubt that the work involved here was inherently dangerous. This seems well settled by the Texas case of *North American Dredging Company v. Pugh, 196 S. W. 255:*

> "For liability to attach to the employer of an independent contractor, it is not required that it be absolutely necessary that injury to a third person will result from the doing of the work, but if the work is so inherently dangerous that injuries will probably be occasioned to third persons unless proper precautions are taken, the employer may be liable for such injuries, though primarily they are caused by the negligence of the contractor in failing to take the necessary steps to avoid the danger."

Therefore, by clear implication, the *Bell* case relied on by the 5th Circuit has either been *distinguished* or has been *impliedly overruled.*

7:

The Federal cases as well as the Texas cases hold that Respondent owed certain legal duties to Petitioner.

The case cited by the 5th Circuit of *Nance Exploration Company v. Texas Employers' Insurance Association, 305 S. W. 2d 621,* is not in any way remotely in point with the fact situation here.

The first portion of the opinion in the *Nance* case is devoted to the proposition that the presence of the electric line and wires was like a red hot depot stove, and that the respondent knew, or should have known, of the danger, and therefore was not entitled to any warning nor was he entitled (according to the opinion) to assume the lack of danger.

This doctrine of obvious and known danger as set forth in the *Nance Exploration Company* case could not be applicable to Hurst, who was only an inexperienced kid 18 years of age, when the danger involved concerned highly technical matters of which he would have little, if any, knowledge.

After we leave the first portion of the opinion written by the newly appointed Associate Justice of the El Paso Court, the further argument is made that the Peachee Drilling Company was an independent contractor under Gulf.

In this case the Gulf Oil Corporation was actually in *ownership* and *possession* of the premises by virtue of a lease under which they were drilling their own oil wells for oil, and such possession carried with it as shown by the evidence of custom and the right of ownership and the right under their drilling contracts, *the right to control the work to the extent of seeing that it was safely done and performed, as well as the non-delegable duty to affirmatively exercise care to maintain and keep the premises reasonably safe for the invitee.* The statement quoting Mr. Justice Hutcheson was mere dictum, but we desire to reply to this

portion of the opinion wherein Justice Hutcheson said in the quoted case *(Union Tank & Supply Co. v. Kelley)*:

> "'We agree, too, that under the undisputed fact, the duty was on plaintiff's employer and not on the defendant to warn plaintiff of the dangers of working with steel at night and to furnish him with adequate lighting and that if there was any negligence in the discharge of this duty, it was the negligence not of defendant but of Wimberley, plaintiff's employer, and it was error for the court to charge these issues to the jury'."

This statement of the law is clearly in conflict with all of the authorities in Texas and throughout the United States, including the opinion of Judge Hutcheson in the case of *Amacker v. Skelly Oil Company, 132 Fed. 2d 431*, and the case of *Gulf Oil Corporation v. Wright* (majority opinion), supra. It was clearly held to be the duty of the Gulf in the following cases to *make* and *keep* the premises reasonably safe to work for a business invitee such as Hurst and Sword. This portion of the opinion is in conflict with the majority opinion in *Gulf Oil Corporation v. Wright*, supra; *Sun Oil Company v. Pierce, 224 Fed. 580; United Production Corporation v. Chesser, 107 Fed. 2d 850; Amacker v. Skelly Oil Company*, supra; *Smith v. Henger, 226 S. W. 2d 425; Roosth & Genecov Production Co. v. White, 262 S. W. 2d 99*—the last two being by the Supreme Court of Texas. In all of the above cases, the court held that the duty was upon the employer of the independent contractor to warn his employee and to exercise ordinary care to furnish and maintain the independent contractor's employee a *safe place in which to work.*

However, the Supreme Court of Texas has never held that the negligence of a plaintiff's employer was a bar to a recovery for the negligence of one situated such as Gulf, the employer of the independent contractor's employee, *for its own negligence* in not *making* and *keeping* the place safe in which to work. No better statement of the rule can be found than in the early Supreme Court case by the eminent Mr. Justice Greenwood in *Galveston-Houston Electric Ry. Co. v. Reinle, 258 S. W. 803*, wherein the Supreme Court of Texas held as follows:

> "The distinction between this case and those denying recovery against an employer for negligence of the independent contractor is stated by the Supreme Court of New Hampshire in Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co., 71 N. H. 530, 53 Atl. 809, 60 L. R. A. 116, in the following language:
>
> " 'The rule is that, where the liability sought to be enforced is based upon the principle of respondeat superior, if the person for whose negligence recovery is sought is himself an independent contractor, or the employee of one over whom as to the detail of his work the defendant has no control, liability cannot be enforced by invoking that doctrine. But, where the duty sought to be enforced is one imposed by law upon the defendant, he cannot escape liability by showing that he employed another, over whom he had no control, to perform it for him.'
>
> "The Supreme Judicial Court of Massachusetts in the case of Cobat v. Kingman, 166 Mass. 403, 406, 44 N. E. 344 and 345, 33 L. R. A. 45, declared:
>
> " 'Ever since Quarman v. Burnett, 6 Mees. & W. 499, it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed be-

tween them. So, that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching to him, of seeing that duty performed, by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it.'

"There is no doubt that the independent contractor was under the duty to exercise ordinary care to give warning to its employees of the dangers incident to their work from proximity of the appliances with which they were required to labor to the deadly electric current carried by the interurban company's wires. Breach of this duty is liability. *It is the breach of the interurban company's own independent duty for which it is answerable. Failure of the contractor to perform its duty would in no wise relieve the interurban company from responsibility for the consequences of failure to perform its own duty to the contractor's employees.*

"The reason for the employer's liability for an injury occasioned like Reinle's is stated in Cooley on Torts to be:

" 'If I employ a contractor to do a job of work for me which, in the progress of its execution, obviously exposes others to unusual perils, I ought, I think to be responsible, * * * for I cause acts to be done which naturally expose others to injury.' 2 Cooley on Torts (3rd Ed.), p. 1091."

In the *Amacker* case, supra, decided by Mr. Justice Hutcheson, which opinion he is apparently attempting to now repudiate, upon some theory that it is inequitable to

permit a man to recover for negligence of a third party who has already collected the paltry amount of $8,750.00 in a lump sum allowed for total, permanent disability in a workmen's compensation case, clearly Amacker's employer was under the duty to furnish him with a gas mask, and warn him of his danger.

In *Husky Refining Company v. Barnes, 119 Fed. 2d 715*, the Court said on page 716:

> "Where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tort-feasor may be held for the entire damage—not because he is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury. Miller v. Union Pacific R. Co., 290 U. S. 227, 54 S. Ct. 172; 78 L. Ed. 285; Washington & G. R. Co. v. Hickey, 166 U. S. 521, 17 S. Ct. 661, 41 L. Ed. 1101; Cordiner v. Los Angeles Traction Co., 5 Cal. App. 400, 91 Pac. 436; The Koursk (1924), P. 140, 40 T. L. R. 399; 131 L. R. 700; Restatement Torts, vol. 2, §430, Comment d; 19 Cal. L. Rev. 630; 25 Cal. L. Rev. 413, 432; 24 Col. L. Rev. 891; 21 Minn. L. Rev. 616. In the case of such independent concurring torts the release of one wrongdoer does not release the other. Young v. Anderson, supra, and cases there cited."

In *Hower v. Roberts, 153 Fed. 2d 726*, the Court held:

> "Nor was it necessary for Mrs. Hower to plead or proceed on the theory of concurrent negligence in order to entitle her to the benefit of that doctrine. She was entitled to proceed against defendant on the theory that he alone caused her injury. Danzansky v. Zimbolist, 70 App. D. C. 234, 105 F. 2d 457; Bragg v. Metropolitan Street R. Co., 192 Mo. 331, 91 S. W. 527. See also Schlemner v. McGee, Mo. Sup., 185 S. W. 2d

866. In the Danzansky case, supra, the court said (105 F. 2d 459):

" 'Appellant contends, however, that because appellee "elected to file her action upon the theory that the defendant (appellant) is solely responsible for her injury, she is not entitled to a submission to the jury on the theory of concurrent negligence. As the court said in Bragg v. Metropolitan St. R. Co., 192 Mo. 331, 359, 360, 91 S. W. 527, 536, in overruling a contention similar to the one now urged: 'In this class of cases, contributing to the injury on the part of a tort feasor, is, in the eye of the law, precisely the same as causing it. No gradation is tolerated. To say that A and B contributed to the injury of C is one and the same thing as saying that A caused the injury and B did, too. The instruction struck at put it to the jury both ways and was well enough.' Properly read, Campbell v. District of Columbia, 64 App. D. C. 375, 78 F. 2d 725, relied upon by appellant, is not inconsistent with the foregoing statement. Although the declaration in that case did not allege concurrent negligence, we stated the applicable rule to be that if there was evidence of such negligence it would be reversible error to charge the jury that the plaintiffs, in order to recover, must establish by a preponderance of the evidence that the negligence of the defendant 'was the sole and proximate cause of the accident'." '

"The evidence summarized herein would have justified a finding that both drivers were negligent and the court submitted the question of defendants negligence in failing to keep a proper lookout and in failing to stop for the stop sign. In the circumstances, Mrs. Hower was entitled to an instruction that she could recover notwithstanding her husband's negligence if his negligence concurred with that of defendant to cause her injury. Such an instruction would not, as contended by defendant, have injected a false issue into the case. The refusal of the instruction was prejudicial error and the judgment in case No. 13,145 must be reversed."

The above cases show that the dictum by Judge Hutcheson in the *Kelley* case is contrary to the great weight of authority in Texas. *In fact it is the only case in Texas that has so held and has certainly since been overruled by subsequent decisions by the Supreme Court of Texas.*

In the *Nance Exploration Co.* case opinion supra, the Court then proceeds to discuss the question of inherently dangerous work, relying on *Humble Oil and Refining Company v. Bell, 180 S. W. 2d 970, which was never authority for anything save special employee since the Supreme Court of Texas, in* 181 S. W. 2d 569, *said that the only reason that they did not grant the writ for the negligence of Humble was because they felt that Bell was as a matter of law a special employee of Humble.*

The reasoning by which the El Paso Court attempted to claim that the injured plaintiff was not a third person is far from satisfactory. *Why should the law protect a stranger, and still not protect one who comes upon the premises at the invitation of the owner to do work for the ultimate benefit and advantage of the owner as an invitee?*

The early Texas cases relied upon by the El Paso Court *are incredible and will not stand analysis when carefully considered in the light of common sense and reasoning.*

We respectfully submit that the Supreme Court of Texas in *Smith v. Henger*, supra, has not only overruled the *Bell* case, but *has made it the non-delegable duty of the owner*

such as Gulf to make and keep the premises reasonably safe for the invitee. We quote from said opinion as follows:

> "The law places upon the owner or occupant of land the duty to use reasonable care to make and keep the premises safe for the use of persons invited to use the premises for business purposes, Carlisle v. J. Weingarten, Inc., 137 Tex. 220, 152 S. W. 2d 1073; Restatement, Torts, §343; 38 Am. Jur., Negligence, §96. Included within the class of persons to whom this duty is owed are the employees of contractors performing construction or other work on the premises. Galveston-Houston Electric R. Co. v. Reinle, 113 Tex. 456, 258 S. W. 803; Montgomery v. Houston Textile Mills, Tex. Com. App., 45 S. W. 2d 140; Snelling v. Harper, Tex. Civ. App., 137 S. W. 2d 222, writ dismissed, correct judgment. When the owner puts some other person in control of the premises or a part of them, such person likewise has the duty to keep the premises under his control in safe condition. Fox v. Dallas Hotel Co., 111 Tex. 461, 240 S. W. 517; Restatement, Torts, §387; 38 Am. Jur., Negligence, §94. A general contractor on a construction job, who is in control of the premises, is burdened with the duty to use due care to provide a safe place for workmen on the premises, including the employees of other contractors. Wilson v. Hibbert, 3 Cir., 194 F. 838; 114 C. C. A. 542; Gucciardi v. Chisholm, 2 Cir., 145 Fed. 2d 514; Kuptz v. Ralph Sollitt & Sons Const. Co., 5 Cir., 88 F. 2d 532; Steele v. Grahl-Peterson Co., 135 Iowa 418, 109 N. W. 882; Henry Pierson & Sons v. Gohr, 126 Md. 385, 94 A. 1021; Kiehling v. Humbes-Deal Co., Mo. App., 16 S. W. 2d 637.
>
> "Where the duty to keep premises in a safe condition is imposed on a person in control of them, this duty may include the duty to inspect the premises to discover dangerous conditions, R. E. Cox Dry Goods Co. v. Kellog, Tex. Civ. App., 145 S. W. 2d 675, writ refused; Hinthorn v. Benfer, 90 Kan. 731, 136 P. 247,

L. R. A. 1915B, 98; Kiehling v. Humbes-Deal Co., Mo. App., 16 S. W. 2d 637; to provide coverings or guard rails or similar devices to protect persons lawfully on the premises from harm, Kirby Lumber Co. v. Hamilton, Tex. Civ. App., 171 S. W. 546, writ refused; Carlson v. Associated Realty Corporation, 114 Conn. 699, 159 A. 885; Perry v. Davis & Sarbent Lumber Co., 215 Mass. 338, 102 N. E. 320; or to warn such persons of the existence of dangers which could not reasonably be expected to be apparent or obvious, Gardner v. Waterloo Cream Separator Co., 134 Iowa 6, 111 N. W. 316; Restatement, Torts, §343; 38 Am. Jur., Negligence, §96. The standard by which this duty is measured is that of reasonable care, and whether the duty has been properly discharged depends on the facts of each case."

Again, on page 433, the Supreme Court of Texas, by use of the following language, made it quite clear that it did not *make any difference who created the danger or whether the work was inherently dangerous,* that it was still upon Gulf, in this case, to exercise care to see that the premises were in a reasonably safe condition, *and to make inspections for the purpose of discovering and remedying or giving warning of hidden danger.* Mr. Justice Hart said in the *Henger* case, as follows:

> "*The fact that the boards were removed and not replaced by some third party, and not by one of Henger's employees, does not excuse Henger from his duty to see that the premises were in a reasonably safe condition or to inspect the shaft for the purpose of discovering and remedying or giving warning of hidden dangers.* Wilson v. Hibbert, 3 Cir., 194 F. 838, 114 C. C. A. 542; Gucciardi v. Chisholm, 2 Cir., 145 F. 2d 514; Henry Pierson & Sons v. Gohr, 126 Md. 385, 94 A. 1021; Annotation, 23 A. L. R. 1009."

It is to be regretted that the El Paso Court and the illustrious Mr. Justice Hutcheson in his specially concurring opinion in the *Wright* case would attempt to relitigate questions of law that have long since been set at rest by decisions of the Supreme Court of Texas. Other Courts throughout America, including New Mexico, as to the issue of special employee and the right of an invitee such as Hurst to maintain a cause of action against an invitee such as Gulf. Their joint action creates the only confusion that exists today. The *Bell* case upon which Mr. Justice Hutcheson relied in the decision of *United Union Tank Co. v. Kelley, 167 Fed. 2d 811*, has been overruled, and the dissenting opinion of Mr. Justice Holmes in the *Kelley* case has now become the law of Texas and throughout America. In the case of *Humble Oil and Refining Co. v. Bell*, supra, on page 976, the Court said:

> "Furthermore, to such an employee the contractor does not owe the duty to exercise ordinary care to protect the servant of the contractor from the risk arising from the negligence of the contractor."

They cite the case of Southern Oil Co. v. Church, 74 S. W. 797, 75 S. W. 817, writ refused, as one of the two cases supporting their position. The case of Southern Oil Company v. Church *has been expressly overruled by the decision in Roosth & Genecov Production Co. v. White, 257 S. W. 2d 140.* We quote from the opinion as follows:

> "If it be assumed that the evidence is sufficient to support one or more or all of the above alleged acts of negligence, appellant takes the position as *reannounced in Southern Oil Co. v. Church, 32 Tex. Civ. App., 325, 74 S. W. 797, 798, writ denied, and applied to a record*

substantially as here, that 'There was no contract duty resting upon the Southern Oil Company (appellant here) to the appellee (plaintiff here). The law would imply the duty resting upon the appellant not to intentionally or willfully injure the appellee, or knowingly furnish him agencies to be used in his employing that are inherently dangerous.' 'The duty looking to the care of the plaintiff, under the facts stated, rested upon Hammil Bros. (partnership here), and for negligence which consisted merely in acts of omission or failure to perform ordinary care looking towards his safety the plaintiff should be limited to a recovery from them.' Many decisions are cited in support of the above doctrine. This holding cited in later Texas decisions with approval has never been expressly repudiated by our Texas courts unless the holding by our Supreme Court in Smith v. Henger, 148 Tex. 456, 226 S. W. 2d 425, 431, 20 A. L. R. 2d 853, relied upon by plaintiff is applicable to this record and by implication repudiates Southern Oil Co. v. Church, supra. The court in Allbritton v. Sunray Oil Co., D. C., 88 F. Supp. 55, 57, cited by appellant, recognized the rule restated in the Church case and attempted to draw a distinction between practically similar records in the two cases in an affirmance of liability.

"Being an intermediate court, the holding in Smith v. Henger, supra, is recognized as applicable here wherein it is stated, 226 S. W. 2d at page 431, 'A general contractor on a construction job, who is in control of the premises, is burdened with the duty to use due care to provide a safe place for workmen on the premises, including the employees of other contractors,' citing numerous authorities."

In *20 A. L. R. 2d 874*, it seems as if the learned authors of this volume are in general agreement wherein they state:

"In an issue between the general contractor and an employee of a subcontractor, where the negligence of

> the latter is the primary cause of the injury, recovery by the employee must rest either on some evidence that the defendant so directed and controlled the subcontractor as to be liable as master, or evidence that the defendant remained in such control of the premises in respect of the cause of the injury as to have been charged with the duty of inspection for the safety of the plaintiff as an invitee person therein. See for example Mohr v. McKenzie (1895), 60 Ill. App., 575, and Fetzer v. Noel Construction Co. (1912), 175 Ill. App. 401."

When *Roosth & Genecov Production Co v. White* reached the Supreme Court of Texas, Mr. Justice Garwood, in an opinion in *262 S. W. 2d 99*, said:

> "Our petitioner, Roosth & Genecov Production Company, Inc., defendant below, seeks relief from a judgment (on a verdict) awarding damages to the respondent-plaintiff White for personal injuries incident to the collapse of an oil well drilling derrick, owned by the petitioner-defendant, but actually erected on its leasehold by respondent-defendant. A. M. Sale, under 'independent' contract between these two parties, and in use at the time of the accident by Carter Jones Drilling Company, which was the employer of respondent-plaintiff White and was drilling the well in question under 'independent' contract with petitioner-defendant. The Workmen's Compensation Insurance carrier of the drilling company, as intervenor, participated in White's recovery and occupies the same position as he. The decision of the Texarkana Court of Civil Appeals, affirming the above-mentioned judgment (Williams, Justice, dissenting) is reported in 257 S. W. 2d 140, and referred to for a more detailed statement of the facts. It should be noted, however, that the petitioner-defendant did not own the lease but stood virtually in the shoes of the owners under an agreement entrusting the former with full operation and control so far as the owners were concerned.

"The first two points on which we granted the writ of error arise via objections of the petitioner-defendant to the special issues (answered unfavorably to it) inquiring whether the petitioner-defendant, 'its agents, servants and employees knew, *or by the use of ordinary care should have known* the condition of the completed derrick as it stood on Curbo No. 17, at the time it was furnished for use in plaintiff's employment'; whether the derrick '*was defective*' and 'defective to the extent that it was inherently dangerous'; and whether 'the furnishing of such defective derrick for use in palintiff's employment' (if found) was negligence and a proximate cause of White's injuries. (The emphasis to the quoted portions of the charge is supplied by us.) The questions thus presented are of both substance and form.

"The one of substance involves the words 'or, by the exercise of ordinary care, should have known' in the issue first above quoted, and is posed by the petitioner's contention that under Southern Oil Co. v. Church, 1903, 32 Tex. Civ. App., 325, 74 S. W. 797, 75 S. W. 817, writ of error refused, 'the petitioner here owed no duty to White' (being the employee of an independent contractor) 'other than not to intentionally or wilfully endanger him or knowingly furnish him agencies inherently dangerous.' If the quoted proposition is correct, the 'should have known' portion of the charge was unjustified, and, indeed, the state of the evidence may require a rendition of judgment in favor of the petitioner.

"The decision mentioned is rather a 'white horse' case, about the only difference between it and the instant case being that in the former it does not appear that the defendant leaseowner caused its defective derrick to be placed on the well site (for use of the drilling contractor) by an independent construction contractor, as did the petitioner in the instant case. *The reasons given in the Church case for denying liability were that, notwithstanding the fact of careless-*

ness of the defendant in furnishing a derrick that was dangerously defective, there was no evidence of control by the defendant over the operations of the drilling contractor and no proof that a derrick is 'inherently dangerous' (that is, dangerous in its normal or non-defective state, like explosives or poisons), which clearly it is not. The facts of the Church case are closer in point than those of the much later decision in Smith v. Henger, 148 Tex. 465, 226 S. W. 2d 425, 20 A. L. R. 2d 853, on which the respondent-plaintiff greatly relies. Smith v. Henger grew out of the construction of a large building and was clearly a case of dangerous premises (as distinguished from a defective apparatus) with a deep hole or shaft deceptively covered with a mere tarpaulin. The rule there applied to hold the defendant liable to the servant of an 'independent' contractor working on the premises was that the owner or other occupier of the premises as a whole, such as a general contractor, or, in the particular case, a construction supervisor and coordinator acting for the owner, owed the servant the duty not only to warn him of hidden dangers known to the occupier, *but also to use ordinary care to ascertain that such dangers existed. The idea of 'inherent danger' was evidently not considered as relevant to the case, and the liability of the defendant was regarded as inconsistent neither with his lack of control over the details of the work of the contractors nor with the further fact that they must have had at least some control over the places at which their respective parts of the work were carried on.* The element of *'control'* as discussed in Smith v. Henger was *not* with regard to whether the defendant had usurped the functions or possession of the various contractors, *but whether, in view of his peculiar position as a mere supervisor and coordinator for the owner, which itself made all the contracts, he could yet be said to stand in the shoes of the owner, as a general contractor would, with respect to liability as an occupier of the premises.*

"*While as stated, the facts of the Church case are peculiarly similar to those of the instant case, the former is inconsistent with Smith v. Henger, if we but assume* that the derrick may be treated as '*premises*' or part thereof, and, *therefore, the Church case would have to yield.* At the time the latter was decided (1903) our 'refusal' of a writ of error did not involve approval of the opinion of the Court of Civil Appeals, so no clear conflict between our own holdings could be said to be involved. Indeed, since the theory of Smith v. Henger was that the defendant in that case owed a duty of due care to furnish a safe place of work to the servants of the contractors because the defendant occupied a position analogous to a general contractor, such a duty is all the more evident in situations like those of the Church case and the instant case, in which the defendant was not a 'supervisor', but actually made the only contracts appertaining to the well, supplied its own derrick and numerous essential materials and itself undertook performance of various essential tasks incident to the work. If the defendant in Smith v. Henger could be treated as a general contractor, the defendants in the Church and instant cases undoubtedly should be.

"And if we concede that it involves too violent an assumption to treat the Church case as one involving the duty of a possessor of premises to an invitee, that decision yet appears to conflict with the more modern rule with reference to liability of a supplier of chattels for personal injury resulting from defects therein. According to the American Law Institute, a duty of inspection to forestall personal injury exists on the part of one who supplies chattels to another for a use in which the supplier has a business interest and extends to the servants of an independent contractor to whom the chattel is supplied. Restatement, Torts, Sec. 392, Comment e, Illustration 1. *The fact that an identical duty exists on the part of the independent contractor as master of the servant in question* " * * *does*

not, however, relieve from liability the original supplier of the chattel who by his failure to inspect it has permitted it to go out of his hands in a dangerous condition.' Id. Sec. 393, Comment a. The duty of the supplier is likened to that of an occupier of land to an invitee. Id. Sec. 392, Comment b, p. 1066. The view of the Restatement clearly does not entail the requirement that the chattel in question be an explosive or other 'inherently dangerous' substance or that the work for which it is destined be of an 'inherently dangerous' character, such as blasting. The rule of the Restatement is evidently in accord with the decision of at least several of the older and larger states. See, for example, McGlone v. William Angus, Inc., 248 N. Y. 197, 161 N. E. 469; Gray v. Boston, R. B. & L. R. Co., 261 Mass. 479, 159 N. E. 441.

"The Church case has lately been referred to as a 'harsh rule.' Allbritton v. Sunray Oil Corp., D. C. 88 F. Supp. 54, 57, affirmed 5 Cir., 187 F. 2d 475. *While no doubt it had more support in general authority when it was decided than it has now, we would hardly be disposed to follow it, even aside from Smith v. Henger, supra.* The Texas decisions—and, indeed, several of those from other states—cited in the former are in our judgment distinguishable from it on the facts. * * *."

It is quite apparent that there is no reasonable excuse or justification for any Court to say after the above decision by the Supreme Court of Texas, that there is not a non-delegable duty upon the part of Gulf under these circumstances to make an inspection of the premises and give warning of danger. This question of special employee certainly in this case was a fact issue for the jury under the decision by the 5th Circuit in *Gibson v. Skelly Oil*

Company, 152 Fed. 2d 588. This decision was one to which the distinguished Mr. Justice Hutcheson lent his implied support, and is greatly in conflict with his specially concurring opinion in *Gulf Oil Corporation v. Wright*, supra.

Further, it is respectfully submitted that the issue or necessity of control or of inherently dangerous work is not essential in this case because the Supreme Court of Texas in the *Genecov* case, and Judge Rives and Judge Brown in the *Wright* case expressly hold that such doctrines and such elements are not necessary to sustain liability with respect to the liability of one as an occupier of premises, such as Gulf. Our position here is much stronger than in the *Genecov* case, in that here Gulf was the well owner and made all of its own contracts with the various specialty companies and exercised itself a supervisory control over all of the work. This makes subdivision b of Sec. 416 of the Restatement of the Law of Torts clearly applicable to this situation, wherein the authors of the Restatement, state the controlling law as follows:

> (b) * * * "If he knows or by the exercise of reasonable care should know that the sub-contractors work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself, so too he is subject to liability if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition and fails to exercise reasonable care either to remedy it himself or by the exercise of his control, cause the subcontractors to do so."

The Courts have finally gotten around to the proposition *of treating this type of case as they do all other cases of*

invitor and invitee, and making the final test whether or not the danger was reasonably foreseeable in the light of attendant circumstances.

Mr. Justice Rives and Mr. Justice Brown, in the *Wright* case, held that a defendant such as Gulf, under this identical fact situation, and under the same drilling contract *remained in such control over the premises as required them to make an inspection of the premises for the safety of plaintiff as an invited person* therein by virtue of the relationship of business invitee or invitor and invitee. *Such an inspection is a non-delegable duty and cannot be escaped by Gulf's letting a contract to an independent contractor to perform that duty.* As a matter of fact, this case is distinguishable from the *Nance Exploration Co.* case in that Gulf was not only in possession of the premises by virtue of an oil and gas lease, but retained supervisory control by virtue of the drilling contract let in each instance to see that the work was conducted safely.

Paragraph 8 in the contract in this case provided in part as follows:

> "Contractor shall provide and have available at all times for use by contractor's employees engaged in the performance of the work herein undertaken, all safety appliances needed for the maximum protection of Contractor's employees against injury."

This is paragraph 6 under Section 8, legal safety precautions of the drilling contract, as same appears on page 248 of the record. It is further specifically provided under

Section 19, styled Inde endent Contractor Relationship, as follows:

> "In the performance of the work herein contemplated Contractor is an independent contractor, without authority to control and direct the performance of the details of the work, Gulf being interested only in the results obtained. But the work contemplated herein shall meet the approval of Gulf and be subject to the general right of inspection herein provided to Gulf to secure the satisfactory completion thereof."

The second sub-heading under Section 19 states:

> "Gulf Representatives' Status:
>
> "The actual performance and superintendence of all work hereunder shall be by Contractor, but Gulf shall be privileged to designate a representative or representatives who shall at all times have access to the premises for the purpose of observing tests or inspecting the work performed by Contractor, and who shall have the right of determining whether such work is being performed by Contractor in accordance with the provisions of this Contract. Such representative or representatives shall be empowered to act for Gulf in all matters relating to Contractor's performance of work herein undertaken." (R., pg. 250.)

It therefore clearly appears that Gulf had by virtue of the contract reserved control and the right to make an inspection of the premises in order to determine if the equipment used by the Contractor provided maximum safety to the Contractor's employees. It challenges common sense to say that they would not be liable for exercising care in the retention of the control which they had thus retained in the contract over the work if they knew or in

the exercise of ordinary care should know that the work was being recklessly and dangerously done.

The trouble with the decision in the *Nance Exploration* case is that it is not remotely in point with either this case, as we have heretofore pointed out, in any material respect, and the refusal of the Supreme Court to grant the application for writ of error in the *Nance* case does not constitute an approval by the Supreme Court of Texas of either the *Kelley* case or *Bell* case, and particularly would not constitute a holding by the Supreme Court of Texas that they are *repudiating and overruling* the decisions in *Smith v. Henger*, and *Genecov v. Roosth*, by which the Supreme Court of Texas overruled the decision in *Humble Oil v. Bell*, and the *Kelley* case.

The decision in *Thompson, et al. v. Rowan Drilling Co., Inc., 197 F. 2d 32*, is likewise not any longer the law in Texas or in the Federal Courts. The 5th Circuit Court, *at the time this case was passed upon probably correctly decided the Rowan case because the Supreme Court of Texas at that time had not overruled the El Paso Court's opinion in Henger v. Smith, 222 S. W. 2d 425-426.* The decision in *Thompson v. Rowan* cites in support of same *Union Tank & Supply Co. v. Kelley, Henger v. Smith*, by the El Paso Court, supra, and *Humble Oil & Refining Co. v. Bell.* In addition to that, the employer, Rowan Drilling Company, had not retained supervisory control to see that the work was safely performed, in the *Thompson* case, as was done by Gulf in both the *Sword* and *Hurst* cases. *This, of course, is an immaterial factor and point, since the*

decision in the Genecov and *Henger* cases. There can be no doubt but that the decision by the Supreme Court in *Smith v. Henger* overruled the law as announced by the 5th Circuit and the El Paso Court in the cases cited. The El Paso Court said, in efffect, for instance, in *Henger v. Smith:*

> "A Contractee under contract of owner to supervise and coordinate work of independent contractor in construction of a building did not owe duty to employee of independent contractor to warn him of obvious danger on the premises, nor did he owe duty of warning of danger of which employee was aware, or in the exercise of ordinary care should be aware, and of which employer was well aware as contractee."

They further held that the evidence failed to show negligence on the part of the contractor acting under contract with owner to supervise and coordinate work by independent contractor in failing to inspect the shaft. This decision was reversed by the Supreme Court of Texas, and along with it *went the decisions in the Bell and Kelley cases. We cannot understand how the El Paso Court can again rely upon any of these cases as authority as they have attempted to do in the Nance Exploration Co. case.*

It is not difficult for the writer to understand the bases of this Honorable Court's action in the case of *Phillips Petroleum Co. v. Gipson, 232 Fed. 2d 13, 1 L. Ed. 2d 77.* The only point involved in the *Gipson* case was contributory negligence as a matter of law for the failure of Gipson to apprehend what this Honorable Court called an obvious danger. This Court, in affirming the trial court, impliedly

held that the question of whether the danger was obvious was a question for the jury. The decision of this Court, in the Gipson case, seems to be in keeping with the great weight of authority everywhere as same is discussed in *Revels v. Southern California Edison Company, 248 Pacific 2d 986.* On page 989, the Court says:

> "Plaintiff urges that defendants, as general contractors, were under a duty to provide Chase, an employee of a subcontractor, with a reasonably safe place to work; that the evidence was sufficient to warrant the jury in concluding that they negligently failed to do so, and that, therefore, the nonsuit should not have been granted. Defendants contend the contrary.
>
> "We use the term 'general contractor' to indicate one who contracts directly with the owner to do the work; and the term 'subcontractor' to indicate one who contracts with the general contractor to do part of the work.
>
> "An employee of a subcontractor doing work contracted to be done by the latter is an invitee of the general contractor, and the duty owed by the general contractor to such employee is the duty owed by one to invited persons. Fountain v. Willard-Slater Co., 172 Cal. 129, 131, 155 P. 630; Lucas v. Walker, 22 Cal. App. 296, 299-300, 134 P. 374, 379. The duty is to exercise ordinary care to keep the premises in a reasonably safe condition, or to warn of danger. *The duty is not limited to conditions actually known to be dangerous, but extends also to conditions which might have been found dangerous by the exercise of reasonable care. Raber v. Tumin, 26 Cal. 2d 654, 658, 226 P. 2d 574.* If there are hidden dangers on the premises of which the invitor has knowledge, *or which are discoverable by him in the exercise of ordinary care, he*

must use ordinary care to give warning thereof. Dobbie v .Pacific Gas & Electric Co., 95 Cal. App. 781, 788-790, 273 P. 630.

"The general rule is that a general contractor on a construction job who is in control of the premises is burdened with the duty to use ordinary care to provide a safe place for employees of a subcontractor to work, including the duty to warn such employees of a danger, either known to the general contractor, or discoverable by the exercise of ordinary care, or otherwise to protect the employees from injury, and to avoid exposing them to injury on account of dangerous conditions. He is bound to take reasonable measures to protect the employees of a subcontractor from injuries likely to arise from places of danger about the building. If he neglects this duty by failing to give adequate notice or warning of the existence of a place of danger, he may be found liable to an employee of a subcontractor for resulting injury. Dingman v. A. F. Mattlock Company, 15 Cal. 2d 622, 624, 104 P. 2d 26; Brockman v. Aldous, 11 Cal. App. 2d 650, 54 P. 2d 43; Caspersen v. La Sala Bros., 253 N. Y. 491, 171 N. E. 754; Annotation 20, A. L. R. 2d 868, and cases there cited.

"*As a part of supervising the work, it is the duty of the general contractor to oversee conditions in the work of each subcontractor so far as they affect the safety of the employees of the subcontractor.* Although the oversight of the work of an employee of a subcontractor is properly the function of the subcontractor who employes him, if the general contractor's superintendent directs such employee in a particular matter, the superintendent may be found to have assumed control of the work of the subcontractor to that extent, and the general contractor may be held responsible for his resulting injury,—as where the superintendent of the contractor directs a carpenter to go on planks not properly supported by the superintendent's employer, Broderick v. Cauldwell-Wingate Co., 301 N. Y. 182,

93 N. E. 2d 629, or sends an employee into a dangerous place and fails to warn him when danger develops, Herndon v. Halliburton Oil Well Cementing Co., Tex. Civ. App., 154 S. W. 2d 163, or tells a stevedore to load a derrick sling with bags of sugar from the side of the pile rather than from the top as he had been doing. McGrath v. Pennsylvania Sugar Co., 282 Pa. 265, 127 Atl. 780, 782. While a general contractor is not under a duty to warn an employee of a subcontractor of obvious danger, the question whether the danger was obvious is a question for the jury. Dingman v. A. F. Mattlock Company, 15 Cal. 2d 622, 625, 104 P. 2d 26; 19 Cal. Jur. 585, §27. If defendant had reasonable grounds to apprehend that Chase might come in contact with the electricity in pursuit of his work, reasonable care required that he be warned, or the wires guarded. Young v. Bates, Valve Bag Corp., 52 Cal. App. 2d 86, 94, 125 P. 2d 840.

"We hold it was the duty of defendants as general contractors, to exercise ordinary care to provide Chase, the employee of the subcontractor, with a reasonably safe place to work. Cf. Kiernan v. Herbert M. Baruch Corp., 20 Cal. App. 2d 289, 66 P. 2d 748.

The decision in the *Revels* case is in accord with the majority opinion of the 5th Circuit in *Gulf v. Wright and is absolutely in repudiation of the Kelley case, the Rowan case, the Bell case, and the Nance Exploration case, so greatly relied upon by the Circuit Court in this cause.* Nothing that has been said in the other cases cited by the respondent in his brief before the Circuit Court has changed the existing law.

Carroll v. Magnolia Petroleum Company, 223 Fed. 2d 657, is not of any comfort to respondent because in that case the Court held that Appellant did not prove any knowl-

edge upon the part of Magnolia of any alleged defects in the derrick, and "he never introduced any testimony to bring himself into a legal relationship to it so as to give rise to a claim in damages for its negligence, nor did he prove any fact to show negligence on its part." The distinguishing fact in the *Carroll* case was "there was a *defect* in the derrick which had existed in the *top of the derrick for a very short time* and apparently the Court must have felt in citing the case of *Moss v. Safeway Stores, 185 Fed. 2d 966*, that the evidence did not reveal *whether the defect had existed long enough that in the exercise of reasonable inspection Magnolia could have discovered it*, because in the *Moss* case the 5th Circuit said on page 967:

> "The evidence does not reveal whether the presence of the object was known to appellee, or how long the object had remained in the store, or, even that its presence was ordinarily dangerous to the safety of store customers. Under such circumstances, we can only conclude that appellant has failed to make a prima facie case. It is well settled in Texas that in order to impose liability upon a storekeeper for injury to a business invitee by reason of dangerous condition on the premises, the dangerous condition must have been created by the storekeeper, or must either have been known to him or have existed for a time that in the exercise of ordinary care he should have discovered it."

citing Texas authorities, including the case of *Houston National Bank v. Adair, 207 S. W. 2d 374*, relied upon by Mr. Justice Rives and Mr. Justice Brown in their great opinion and majority opinion in the *Wright* case, holding that fact issues were raised which a jury should decide.

The decision relied upon by the respondent in *Oaxaca v. Lowman, 297 S. W. 2d 729*, is not in point with this case. The El Paso Court points out the distinction in the following language:

> "Nor could the general contractor have foreseen that the crate would be put to any such use as was done by plaintiff. His affidavit shows that plaintiff's immediate employer (sub-contractor), was required to furnish the necessary scaffolds and ladders for his men. The record shows that such was available, but was rejected by plaintiff after an intelligent and considered choice. Therefore, we do not think the results could have been reasonably foreseen by general contractor.
>
> "It is also obvious from the record that the danger in using the crate in the way he did was as obvious to plaintiff as it could have been to defendant, the general contractor. This was not a concealed danger, as was found in the Henger case, Smith v. Henger, 148 Tex. 456, 226 S. W. 2d 425, 20 A. L. R. 2d 853. Plaintiff in his deposition reveals that he had considered the danger in using the crate and had tried to alleviate it, at least to some extent, by having the workman, Rivera, stand at the bottom of the crate and hold it steady; so here we have a risk that is as open and obvious to the plaintiff as it could be or was to the general contractor.
>
> "It is also inescapable, due to the circumstances here present, that plaintiff here deliberately and voluntarily assumed the risks attendant to using the crate in the manner he did. Nobody told him to do it, and his deposition shows that he discussed it with the workman who was up in the rafters or beams. Plaintifffs' injuries did not result from the passive presence of a hazard similar to the elevator shaft, in the Triangle Motors Case, Triangle Motors of Dallas v. Richmond, 152 Tex. 354, 258 S. W. 2d 60, or the pres-

ence of the Shaft in the Henger case. *Plaintiff here, by his own affirmative action, created his own hazard and then voluntarily assumed the risks attendant thereto.*

"Lastly, it is clear that plaintiff, *by creating his own hazard and then using it, was guilty of contributory negligence as a matter of law.* The scaffold was nearby and available; the risk was open and obvious to plaintiff; and yet he rejected the scaffold, prepared the crate for the use to which he put it, and, after discussion as to its safety, climbed up on it and was injured while thereon." (Emphasis ours.)

It certainly cannot be contended that Hurst was charged with knowledge of *obvious* danger and made a *considered* choice to take the dangerous way when a safe way was available.

Likewise, the decision of *Moore v. Texas Company, 299 S. W. 2d 627,* is not in point because in this case the facts are entirely different in that the Court held that there was no evidence that Hise was acting in the scope of his employment, and second that "It may have been appellant himself told Hise [illegible] the brake," indicating that the proof failed to [illegible]ence upon the part of the Texas Company. Neither of such circumstances exist in either the *Sword* or *Hurst* cases.

Of course, where the Supreme Court refuses a writ of error for want of merit, it is *impossible* to say whether the Supreme Court felt, in the *Moore* case, that the company was right in its assumption that Hise was not acting with the scope of his employment for the Texas Company, or that the evidence failed to show negligence upon the part

of the Texas Company. It is, therefore, respectfully submitted that the *Moore* case and the *Oaxacu* case, under the above circumstances, cannot be anywise considered as authority for overruling decisions in *Genecov and Roosth*, supra, and *Smith v. Henger*, supra, by the Supreme Court of Texas.

8.

The Charge of the Court was erroneous.

It is quite obvious that the entire charge of the Court, as complained of in question No. 6, amounted to an instructed verdict by the Court against the appellant, and *completely made a nullity of the earlier portions of the Court's charge wherein he told the jury that it was the duty of Gulf Oil Corporation to exercise ordinary and reasonable care to make and keep the place safe and to inspect the premises, and said charge of the Court thus became so conflicting and ambiguous that the plaintiff's portion of the charge so conflicted with defendant's portion of the charge that said charge was absolutely meaningless, and the judgment of the Court based on the jury's verdict under such circumstances, the law not having been correctly set forth in the Court's charge should* be set aside and reversed on account of the error complained of in petitioners' specification of error No. 6.

9.

The doctrine of discovered peril is applicable.

In *East Texas Theatres v. Swink, 173 S. W. 2d 224*, the Court, on page 227, said in the opinion:

> "It is appellant's position that the doctrine of discovered peril cannot arise except in connection with

animate or moving objects or things which bring about the injury and which are set in motion by the person so charged. We have been unable to find a decided case where discovered peril has been the basis of recovery in a negligence case involving a structural hazard not connected with an injury resulting from machinery, automobile, trains, or other moving things where in the so-called dangerous instrumentality was an animate or moving thing. We fail to see the logic or reason to limit the application of negligence under the discovered peril doctrine only to the instrumentalities and under the conditions here urged by appellant.

"In the case of the operator of a train or automobile, who discovers the perilous position of a person in time to avert the injury by the use of the means at hand, the further element under the doctrine of discovered peril is met by proof that the operator after such discovery failed to exercise ordinary care in the use of the means at hand to avert injury, namely, the failure to sound a whistle, a bell or a horn, and such failure was a proximate cause of the injury. The instant case involves the alleged failure of the employee to timely give a vocal warning after his alleged discovery of plaintiff's perilous position.

"If the pit was uncovered and unguarded and had been kept in such condition during the months of Fallin's employment on the premises, if the stage was in darkness at the time, and if this employee had guided plaintiff to the edge of the stage within a step or two of such hidden danger, we would not be in a position to disturb the jury's finding that this employee knew and realized that Swink was then in a dangerous position. If thereafter this employee suggested to plaintiff to make the jump as he, the employee, was doing or had just done, and caused plaintiff to proceed on in an attempt to follow the employee without giving plaintiff warning of such danger, then such attendant facts and circumstances were

> for the jury to weigh in determining if defendant's employee had discovered plaintiff's perilous position in time to have averted the injury by the use of the means at hand. 'Discarding all adverse evidence and giving credit to all evidence favorable to plaintiff and indulging every legitimate conclusion favorable to plaintiff that might have been drawn from the facts proved,' 17 T. J. (Evidence) Sec. 410, we feel unwarranted in disturbing the affirmative findings to issues Nos. 15, 16 and 17."

It is true that the Supreme Court reversed this case, but not upon the theory that discovered peril would not be applicable, but simply upon the proposition that the discovery of the perilous position of plaintiff was not *made in time* for warning to have been given.

We further believe that reversible error was clearly committed by the Honorable Trial Court in failing to submit Plaintiff's Requested Issue No. 4 as complained of. Cases in support of our question No. 6, the error of the Court, and further in support of the point that issues were raised for a jury's determination, are:

> "In Meny v. Carson (1950), c NJ 82, 77 A 2d 245, the plaintifff was injured by the collapse of a scaffold erected by employees of the contractor for the carpentry, which these latter employees had left for the use of the roofers, of whom the plaintiff was one. The gravamen of the complaint was the negligent furnishing by the defendant general contractor of a defective scaffold for the plaintiff's use. The question on defendant's appeal was whether there was any evidence of negligence on its part. Premising that the plaintiff was on the premises at the implied invitation of the defendant, and that consequently the defendant was bound to use reasonable care to see that the plaintiff had a reason-

ably safe place to work, the court held that, in the absence of any evidence as to what caused the scaffold to fall, the rule res ipsa loquitur applied and supported the plaintiff. This conclusion was based on evidence that the scaffold was in the joint control of the contractor for carpentry and the defendant, and the fact that there was some evidence that the cause of its collapse was a disengaged bracket. *To the argument that the defendant was not liable because it had committed the duty of supplying a scaffold to an independent contractor, the court replied that the defendant could not so relieve itself.*

"*But if a hoist being used by a subcontractor is rendered dangerous by reason of the sucontractor's supporting it with a defective timber, and knowledge of the dangerous condition is brought home to the general contractor's superintendent on the job, an employee of a different subcontractor may recover from the general contractor for a resulting injury on proof of the superintendent's neglecting to interfere.* Sufferling v. Heyl & Patterson (1909), 139 Wis. 510, 121 NW 251."

* * * * *

"A failure properly to supervise the method of operation, even though *the immediate fault* was that of the plaintiff's employer or fellow servants, was the issue in Pelowski v. J. R. Watkins Medical Co. (1912), 120 Minn. 108, 139 N. W. 289, 139 N. W. 618. The building was being constructed with brick walls faced with a veneer of stone slabs. The general contractor was doing the brickwork itself, but had let out the stonework to a subcontractor. The latter had sublet the stonesetting. The mode of construction followed was for the stonesetters to set a course of the stone slabs erect in position, and for the bricklayers to set the brickwork behind the stones, anchoring the stones in place as they went along by embedding steel ties in the brickwork. When the cornice was reached, the stone

courses were to be projected out beyond the wall below them, each farther than the one below. Through the failure of the stonesetters to wait until a course was backed by the brickwork before beginning another, or because of the failure of the bricklayers to proceed to back that course at once, that part of the cornice fell, one of the stones struck and killed the plaintiffs' decedent, an employee of the subcontractor for the stonesetting, while he was at work on the ground below. *It appeared that the general contractor kept a superintendent on the job, that the contract with the subcontractor for the stone work provided that the latter should prosecute the several parts thereof at such time and in such manner as the general contractor might direct. There was some evidence that it was the duty of this superintendent to observe when and how these stone courses were laid. The case was held properly submitted to the jury and a judgment for the plaintiff was sustained.* (Emphasis ours.)

In connection with the above three cases, we refer this Honorable Court to the testimony of Mr. Raymond Knox, who had been a gang pusher and drilling foreman, and assistant drilling superintendent for the Gulf for many years. He testified affirmatively, as set out on page 143 of the record when asked "In a case where Gulf has a drilling contractor on a job, and they are doing swabbing, and the men for the drilling contractor have been put on company time, and they are attempting to bring in the well, is there any custom with reference to inspection that is made by the Gulf's drilling superintendent of the equipment of the contractor under those circumstances?" His answer was that his instructions from Gulf were to inspect anything that should be of a hazardous nature to humans

and material, and otherwise, and it was customary for the drilling superintendent under those circumstances to make an inspection of the premises to determine if they were safe, and he named equipment such as sheave, and wire cable, and size and type of rope, and diameter of sheave, that should be inspected as a matter of *safety* and as a matter of *custom*, and further asserted that the Gulf had authority to stop any and all operations and do anything that they wanted to do with respect to orders in this connection. It must be remembered in this connection that Knox was working under the same type of drilling contract as is here involved.

ARGUMENT AND AUTHORITIES

In *Gulf Oil Corporation v. Wright, 236 Fed. 2d 46*, the majority opinion relied on such decisions as *Sun Oil Co. v. Pierce, 224 Fed. 2d 580; United Production Corporation v. Chesser, 107 Fed. 2d 850; Amacker v. Skelly Oil Company, 132 Fed. 2d 431:* The majority of the Court held that questions of fact were raised for the jury but Judge Brown held that the evidence was insufficient to show the nature of the toxic gas. The majority opinion clearly shows the fallacy of the reasoning used by respondent in the following language in which Mr. Justice Brown said:

> "The relationship under Texas law between an occupier of land and his invitees (including employees of an independent contractor) and between a general contractor and employees of subcontractors is the same, Roosth & Genecov Production Co. v. White, 152 Tex.

619, 262 S. W. 2d 99; Smith v. Henger, 148 Tex. 456, 226 S. W. 2d 425, 20 A. L. R. 2d 853, and gives rise to a like duty, 'Accepting * * * the status of the plaintiff * * * as that of business invitee, the defendant owed him a duty to use reasonable care to *make* and *keep* the premises reasonably safe for his use * * *,' Triangle Motors of Dallas v. Richmond, 152 Tex. 354, 258 S. W. 2d 60, 62; Hall v. Medical Building of Houston, 151 Tex. 425, 251 S. W. 2d 497; Smith v. Henger, supra; Renfro Drug Co. v. Lewis, 149 Tex. 507, 235 S. W. 2d 609; Weingarten Inc. v. Brockman, 134 Tex. 451, 135 S. W. 2d 698; McKee v. Patterson, 153 Tex. 517, 271 S. W. 2d 391, 393; and which, whether it involves primarily the condition of premises or a chattel supplied for use, or, more comparable here, for work in or around dangerous things, the manufacture, sale or supplying of dangerous articles, brings into application the underlying standard of the Restatement of Law that a duty arises if, but only if, the occupier, supplier, or manufacturer *has reason to expect that those likely to come in contact with it will not know of the danger.*

"This measured it upon the objective standard of what the defendant could reasonably expect others to know. The duty is '* * * *to warn such persons* of the existence of dangers which could not reasonably be expected to be apparent or obvious * * *, Restatement, Torts, §343,' Smith v. Henger, supra at 226 S. W. 2d 425, 431. Liability does not exist for defects '* * * which are not of such a character that danger is reasonably to be anticipated from them to persons exercising ordinary care,' A. C. Burton Co. v. Stasny, Tex. Civ. App., 223 S. W. 2d 310, 313, error refused; but it may exist where invitees '* * * would not be *expected to be fully aware of its use or dangers* * * *,' Walgreen-Texas Co. v. Shivers, 137 Tex. 493, 154 S. W. 2d 625, 629; Houston National Bank v. Adair, supra. It is, or may be, akin to dangers which are (or

ought to be) open and odvious and as to which no duty is owed, McKee v. Patterson, supra; Fain v. Goodyear Tire & Rubber Co., Inc., 5 Cir. (Texas), 228 F. 2d 508; Phillips Petroleum Co. v. Gibson, 5 Cir. (Texas), 232 F. 2d 13, but in many situations it is, or may be, much different. For example, a can of gasoline, properly labeled, may not be an open and obvious hazard from its general appearance and yet, despite its destructive capacity, a supplier has no liability for misuse by a user since, at this late date, it is expected that the dangers will be known, i.e., understood, appreciated. Cf. Waters-Pierce Oil Co. v. Davis, 24 Tex. Civ. App. 508, 60 S. W. 453; Texas Drug Co. v. Cadwell, Tex. Civ. App., 237 S. W. 968, writ refused; Liggett & Meyers Tobacco Co. v. Wallace, Tex. Civ. App., 69 S. W. 2d 857, writ dismissed." (Emphasis ours.)

Mr. Justice Rives, in his dissenting opinion, throught that the judgment of the trial court in the *Wright* case should have been affirmed. On page 60 *(236 Fed. 2d)*, in said opinion, Mr. Justice Rives stated as follows:

> "Under this factual situation, it seems to me that the controlling Texas law is well stated in Robert E. McKee, General Contractor, Inc. v. Patterson, 153 Tex. 517, 271 S. W. 2d 391, 395:
>
> > " 'In all such cases, knowledge of the existence of the condition and appreciation of the danger therein by the parties are important factors in determining liability, but the rule for determining whether the parties should have known of the condition and appreciated its danger is not always the same as to each. The owner is charged with knowledge of any dangerous condition that a reasonable inspection would have revealed because *his duty to keep his premises in a reasonably safe condition for use by his invitees includes a duty*

to inspect. Smith v. Henger, supra (148 Tex. 456, 226 S. W. 2d 425, A. L. R. 2d 853); R. E. Cox Dry Goods Co. v. Kellog, Tex. Civ. App., 145 S. W. 2d 675, writ refused. There is no such obligation on the invitee. Peck v. Peck, 99 Tex. 10, 87 S. W. 428; Triangle Motors of Dallas v. Richmond (152 Tex. 354), 258 S. W. 2d 60, 63. While he may not close his eyes to obvious dangers, he has a right to assume that the premises are safe for his use. Blanks v. Southland Hotel, Inc., 149 Tex. 139, 299 S. W. 2d 457, 360; Triangle Motors of Dallas v. Richmond, supra; Restatement of Torts, Vol. 2, Secs. 343a and 343d.

" 'In order to fix liability on the owner it must first be established that he knew or should have known of the existence of the condition and that he should have appreciated its dangers. Once this is established either as a matter of law or by a fact finding, the inquiry then turns to what was known and appreciated, or should have been known and appreciated, by the invitee. In some cases the existence of the condition may be so open and obvious and the dangers inherent in it so apparent that we may say as a matter of law that the invitee should have known of and appreciated them. Houston National Bank v. Adair, 146 Tex. 397, 207 S. W. 2d 374; Marshall v. San Jacinto Bldg., Tex. Civ. App., 67 S. W. 2d 372, writ refused; A. C. Burton Co. v. Stasny, Tex. Civ. App., 223 S. W. 2d 310, writ refused; United Gas Corp. v. Crawford, 141 Tex. 332, 172 S. W. 2d 297. In others, whether the condition was so open and obvious and the dangers in it so apparent that the invitee should have known of them may be fact questions. Triangle Motors of Dallas v. Richmond (152 Tex. 354), 258 S. W. 2d 60; Hall v. Medical Bldg. of Houston, 151 Tex. 425, 251 S. W. 2d 497; Blanks v. Southland Hotel, 149 Tex. 139, 229 S. W. 2d 457'."

10.

The cases are in conflict.

The opinion by the Fifth Circuit in *Holt v. Texas-New Mexico Pipeline Co., 145 Fed. 2d 822*, dramatically presents a conflict existing between this case and the cases set out in the Petition For Writ of Certiorari wherein the Court said, speaking through Mr. Justice Holmes, on Pg. 863, as follows:

> "Appellant contends that these facts made out a case for determination by the jury under two well-settled legal principles: (1) That an owner or occupant of premises owes a duty to an invitee to maintain such premises in a reasonably safe condition; and (2) that where one secures the performance of work that is intrinsically dangerous, however skillfully it may be performed, the one in whose behalf the work is done is charged with the highest degree of care to prevent injury, which duty may not be delegated to another.
>
> "*These principles have long been recognized in Texas.*"

They cite in support of the recognition of these principles of law, under Footnotes 1 and 2, the following cases, among which are several of the cases which Petitioner set forth as representing a conflict which Respondent's counsel has seen fit to attempt to deny and to differentiate:

Footnotes 1 and 2 of the *Holt* decision cites:

> "1. Cameron Mill & Elevator Co. v. Anderson, 98 Tex. 156, 81 S. W. 282, 1 L. R. A., N. S., 198; Galveston-Houston Electric Ry. Co. v. Reinle, 113 Tex. 456, 258 S. W. 803; Bustillos v. Southwestern Portland Cement Co., Tex. Comm. App., 211 S. W. 929; Atex Construction Co. v. Farrow, Tex. Civ. App., 71 S. W. 2d 323; El Paso Electric Co. v. Buck, Tex. Civ. App.,

113 S. W. 2d 438; Loyd v. Herrington, Tex. Civ. App., 178 S. W. 2d 694, 700; 18 R. C. L. 542; 27 Am. Jur. 517.

"2. Crow v. Continental Oil Co., 5 Cir., 100 F. 2d 292; United Production Co. v. Chesser, 5 Cir., 107 F. 2d 850; Amacker v. Skelly Oil Co., 5 Cir., 132 F. 2d 431; Galveston-Houston Electric Ry. Co. v. Reinle, 113 Tex. 456, 258 S. W. 803; Hozian v. Crucible Steel Casting Co., 132 Ohio St. 453, 9 N. E. 2d 112 A. L. R. 333, and cases cited."

It is quite obvious that the holding in the above cited cases holding that the owner-occupant of premises owes a duty to an invitee, such as Petitioner, to maintain such premises in a reasonably safe condition is in conflict with the holding in this case wherein the Fifth Circuit has held for the first time that this rule of protection for the invitee applies only where the invitor, or employee of the independent contractor, has actual control of the work and then they go further and say that if they do have actual control of the work then there can be no third party suit maintained since the exclusive remedy is under the Workmen's Compensation Act of Texas. If such had been the law in the Federal Courts or in Texas, no recovery could have been had in all of the cases listed above or set out in our Petition For Writ of Certiorari as conflicting with the decision in the case at bar.

It will be observed also that the *Holt* case (which was a suit for an employee of an independent contractor against the Texas-New Mexico Pipeline Co., the owner-occupant)

recognizes that the doctrine of intrinsically dangerous work does inure to the benefit of the employee of the independent contractor.

The Fifth Circuit, expressly decided this very point in *Sun Oil Co. v. Kneten, 164 Fed. 2d 806, on Pg. 809,* in a decision in which Mr. Justice Hutcheson participated, when they said:

> "It is also the law in Texas that when the work contracted for is unusually dangerous in itself as the result of circumstances brought about by the owner or employer in the first instance, and injury proximately results from such conditions, the employer is responsible to servants of the independent contractor for such injuries."

It is difficult for counsel to understand how Respondent can say that there is no conflict between these cases as listed in our Petition For Writ of Certiorari and as cited in the *Holt* case, supra, and this declaration in the *Kneten* case, supra, and the holding of the Court in this case that the doctrine of inherently dangerous work *does not inure, under any circumstances, to the benefit or for the protection of the employee of the independent contractor.*

The Fifth Circuit in *Union Tank & Supply Co. v. Kelley, 167 Fed. 2d 871,* and *Cagle v. McQueen, 209 Fed. 2d 186,* held contra but we will point out in this connection two things. First, they did so because of the decision in *Humble v. Bell, 180 S. W. 2d 970,* and this decision was entitled to no weight at all on any issue save special employee since the Supreme Court expressly held, in writing its opinion as to

why the writ was denied, that it was denied was because Bell was a special employee of Humble. *181 S. W. 2d 569.* Secondly, the Federal Courts hold, as in the *Halecki* case, supra, and others herein cited, that the duty rests upon the employer of an independent contractor to make an inspection of the premises and to oversee and supervise the work of the independent contractor in order that he might perform the duty which he owes the invitee of keeping, furnishing and maintaining the place where he is to work reasonably safe. *It is a hollow thing to say that Gulf owes this duty and then say that if they let out a contract to an independent contractor who doesn't perform it that Gulf is not liable.* The decision by Judge Hand in the *Halecki* case and the others cited cannot be reconciled on this point with this decision as to the duty to make an inspection throughout the work from the time of its inception to the time of its completion.

Since this case is controlled *by Federal law*, it is the duty of this Honorable Court to say which of the Federal decisions control. The holding of the Fifth Circuit in this case *practically abolishes third party cases by holding that actual control must exist before duty and that if actual control does exist, there is no cause of action.*

It is quite obvious that this decision is not only in conflict with great weight of authority throughout America, but is in conflict with all previous decisons of the Fifth Circuit. It is further obvious that this *sudden and mysterious change*

has been made without just cause, explanation or excuse and that hundreds of thousands of injured workmen and their widows in the years to come will be denied protection *unless* this Honorable Court adopts the stand which it has taken so many times recently and again holds that in a diversity case where the right of trial by jury is involved, that Federal law must control if it collides with local law in view of the requirements of the Seventh Amendment to the Constitution of the United States.

Judge Cardozo once said:

> "The final cause of the law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. * * * If judges have woefully misinterpreted the mores of this day, or if the mores of their day are no longer those of ours, they ought not to tie in helpless submission, the hands of their successors."

These are great, imperishable and durable truths. And they are recalled to mind whenever we read the speeches of appellate judges, caught in the illicit embrace of the 19th century, who seek to defend their allegiance to no-duty rules and immunity rules by having us believe that it is not they that speak but the iron voice of stare decisis that speaketh in them. This reminds one of the biographer who wrote of Gladstone that his conscience was not only his guide but his accomplice.

11.

Retrial by a new Jury rather than factual re-evaluation by a Court is a constitutional right of genuine value.

The language of Mr. Justice Black in his famous opinion in *Galloway v. United States, 319 U. S. Pg. 400, 87 L. Ed.*

1477, is exactly as above set out. This is Mr. Justice Black's description of the holding in *Slocum v. New York Life Insurance Co.*, *228 U. S. 364*, *57 L. Ed. 879*.

In the *Slocum* case, supra, this Court said:

> "In United States v. Wonson, 20 Fed. Case No. 16,750, a case decided in 1812 and often cited with approval by this Court, it was said by Mr. Justice Story, after quoting the words of the amendment:
>
> > "'Beyond all question the common law here alluded to is not the common law of any individual state (for it probably differs in all) but it is the common law of England, the grand reservoir of all our jurisprudence.'"

It is difficult, when one studies the background of the Seventh Amendment and its plain, unmistakable language, to understand how any Court has ever held as has the Fifth Circuit in this case, that in this Federal case, the law of Texas must be applied and must control.

This Honorable Court has done much in the cases hereinbefore discussed, to correct errors of this nature. We believe the views of this Honorable Court, based upon all recent decisions, coincide with the imperishable words of Mr. Justice Black in the *Galloway* case when he said:

> "The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. Either the Judge or the Jury must decide facts and to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain."

This Court cited with approval the *Galloway* case in the recent *Schulz v. Pennsylvania Railroad Company* decision, *350 U. S. 523, 100 L. Ed. 668, 76 S. Ct. 608.*

Petitioners here ask this Honorable Court to again live up to these two great promises made in the *Galloway* case, supra, to-wit:

> (1) "Trial by Jury is a fundamental guaranty of the rights of the people and Judges should not search the evidence with meticulous care to deprive litigants of Jury trials.
>
> (2) "Since this is a matter of high constitutional importance Appellate Courts should be alert to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances."

In the *Sword* case we are confronted with a situation wherein after the trial court overruled the motion for directed verdict and submitted the case to the Jury, he, upon the failure of the Jury to agree, re-examined the factual situation, in violation of the Seventh Amendment.

The Fifth Circuit indicates, in Footnote 3 of the *Sword* opinion, that there has been some waiver of Petitioner's rights to complain of the Court's entry of a Summary Judgment after the failure of the Jury to agree.

It is elementary that questions going to the Jurisdiction of a Court cannot be waived even though raised for the first time on appeal.

In the *Hurst* case the Respondent claims that all the Fifth Circuit held, with reference to the Charge of the Court, was that it made it *difficult* for the plaintiff to receive a verdict. This is incorrect. On Page 838 of the *Hurst* opinion, the Court said:

> "It submitted the case to the Jury under instructions, however, which, when followed by the Jury, *precluded* a verdict for the plaintiffs."

This is a flat holding by the Fifth Circuit that had there been a case for the Jury that the Court submitted the case in such a way that the plaintiff couldn't win.

We think the Respondent made a mistake in his Brief and failed to notice this ruling of the Court. Apparently, the basis for their mistake was the subsequent statement by the Court:

> "There were other instructions which made a verdict for the plaintiffs practically impossible."

In fact, the Trial Court, by his own action in the *Sword* case, in withdrawing certain identical portions of the Charge that had been given in the *Hurst* case, expressly admitted that the *Hurst* Charge was fundamentally erroneous. See Pages 190 to 204, R., *Sword* case.

It is quite obvious, therefore, that as to the *Hurst* case, as a matter of judicial fairness, the Respondent should not be permitted to claim that the Court entered a judgment based on a jury verdict, as well as a Summary Judgment, since it is evident that a new trial would have been granted

by the Court based on his own admitted erroneous charge, had the Trial Court not re-examined the facts and entered a Summary Judgment in violation of the Seventh Amendment.

Hence, "special and important reasons," call for the granting of the Writ for Certiorari.

CONCLUSION AND PRAYER

WHEREFORE, your petitioners respectfully pray this Honorable Court to grant the Petition for Writ of Certiorari to the end that on review, the Circuit Court may be directed to reverse its judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of the foregoing were deposited in the United States mail at Washington, D. C., each in properly stamped envelopes addressed to respective counsel for Respondent, viz.: William L. Kerr and William Monroe Kerr, 211 First National Bank Bldg., P. O. Box 913, Midland, Texas, on this the day of September, 1958.

By

Of Counsel for Petitioners.